

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL JAY VANIER,

Defendant-Appellant.

UNPUBLISHED
November 9, 2006

No. 264852
Cheboygan Circuit Court
LC No. 04-003085-FH

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c (multiple variables), and three counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (victim between the ages of 13 and 16). He was sentenced as a third-offense habitual offender, MCL 769.11, to serve concurrent prison terms of 6 to 30 years for both CSC II convictions, and 1 year and 4 months to 4 years for each CSC IV conviction. Defendant appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first raises a three-pronged attack to the actions of the prosecutor. However, defendant does not argue that each asserted error individually requires reversal. Rather, he argues the cumulative impact of the errors denied him a fair trial. We review claims of prosecutorial misconduct de novo in context to determine if the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). A prosecutor's comments are evaluated in light of defendant's argument and the relationship they bear to the evidence. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant argues that the prosecutor committed misconduct by bolstering the credibility of one of the victims by noting she had no motivation to lie. We disagree. A prosecutor may not imply he has special knowledge concerning a witness's truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), or place the prestige of his office behind the witness, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). However, a prosecutor may "as an advocate . . . make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on

which witness is believed.” *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983) (citations omitted).

Here, the cited comment of the prosecutor was an argument for the witness’s credibility based on the evidence adduced. It neither indicated special knowledge, either explicitly or implicitly, nor did it lend the credibility of the prosecutor’s office to the witness’s testimony. Moreover, the prosecutor’s comments addressed the argument advanced by defendant that the victims had lied. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004) (observing that statements made by the prosecutor “were a fair comment on the evidence and were responsive to defendant’s arguments”). Viewed as a whole, the prosecutor’s remarks did not amount to impermissible bolstering of the witness’s credibility.

Defendant also contends that when commenting in closing argument that defendant’s wife had failed to mention potentially exculpatory evidence until trial, the prosecutor implied to the jury that she had a duty to inform the police of this evidence. Defendant asserts this implication impermissibly shifted the burden of proof. However, a prosecutor’s “[a]rguments regarding the . . . credibility of the witnesses . . . do not shift the burden to the defendant to prove his innocence but rather question the reliability of the testimony and evidence presented.” *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). Moreover, defendant’s wife testified that she did not notify police that one of the victims was on a camping trip at the time of the alleged assault, despite being aware of the information at the time of the incident. With supporting evidence on the record, the prosecutor did not engage in misconduct by implying defendant’s wife’s exculpatory claim was not credible.

Additionally, defendant argues that the prosecutor’s attempt to reference a chart depicting a family tree was improper because the chart was used as a visual aid during trial but not admitted as evidence. Witnesses had testified to the familial relationship of defendant to the victims and that the information depicted on the chart accurately depicted the relationship between the victims and defendant. The attempted reference was objected to and sustained. The jury was instructed to consider only the evidence before it and that “evidence includes only the sworn testimony of witnesses and exhibits that were admitted into evidence.” A jury is presumed to follow its instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and is presumed to have disregarded the reference.

Finally, because the first two alleged instances of prosecutorial misconduct were not misconduct at all, they cannot sustain a cumulative effect argument. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). As for the claim regarding the family tree chart, defendant fails to establish that the reference to the chart was “seriously prejudicial,” *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001), especially in light of the jury instructions.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio